Filed 3/9/09 In re T.M. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re T. M., a Person Coming Under the Juvenile Court Law.	B206227 (Los Angeles County Super. Ct. No. CK67171)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C. M., Defendant and Appellant; D. S., Intervener and Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County.

Stephen Marpet, Juvenile Court Referee. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Leslie A. Barry, under appointment by the Court of Appeal, for Intervener and Respondent.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Minor.

Appellant, C. M., appeals from an order of the juvenile dependency court finding respondent, D. S., to be the presumed father of appellant's son T. M. (T.), born May 15, 2003. The order was rendered under Family Code section 7611, subdivision (d), which provides that a man is presumed to be a child's natural father if "He receives the child into his home and openly holds out the child as his natural child." Appellant contends that substantial evidence does not support the finding as to either element. Respondent defends the ruling, and also argues that appellant lacks standing to challenge it. We affirm.

FACTS

Appellant is the mother of both T. and an older son, D. M., born October 2001. D. M. is respondent's biological child, but T. is not. His biological father's name is unknown to appellant. Both minors suffer from a seizure disorder requiring medication. In addition, T. has a speech delay, while D. M. has cerebral palsy and cannot talk; both minors wear diapers.

In February 2007, the minors, just arrived from Alabama with appellant, were discovered alone in a Long Beach motel room, where appellant had left them for several hours. D. M. was confined in a high chair, while T. crawled around, putting inedible objects in his mouth. The minors were taken into the custody of the Los Angeles Department of Children and Family Services (DCFS). When appellant returned to the motel, she was arrested. She explained that she had gone to get the children something to eat, and didn't know what she'd been thinking. Appellant was apologetic and desired to work to get her children back. She identified respondent as their father.

The minors were placed in foster care, and the juvenile court ordered them detained. DCFS's jurisdiction/disposition report of April 2007 recited that respondent understood, from a DNA test, that he was not the natural father of T., but stated he still held himself out as such. In a March 13 telephone conversation with the social worker, respondent stated he hadn't known about appellant leaving Alabama. He "want[ed] both boys," and his mother and other relatives expressed concern for the minors' well-being and a desire that they live with respondent and his mother.

DCFS recommended that T.'s brother be released to respondent, and that proceedings to place T. with him be initiated, under the Interstate Compact for Placement of Children (Fam. Code, § 7900 et seq.; ICPC). On April 13, 2007, the court assumed jurisdiction over the minors, and ordered expedited ICPC proceedings for both, as well as continued reunification services for appellant. Respondent attended this hearing. His counsel told the court that there was a joint custody order for D. M. in Alabama, with primary custody for appellant and child support by respondent. In addition, respondent's mother, with whom respondent was presently living, was a registered nurse, able to help with the minors. The court stated that respondent appeared to be D. M.'s presumed father. Appellant stated that she did not know the name of T.'s natural father; respondent did not at this point claim to be T.'s presumed father.

In a report prepared for April 26, 2007, DCFS attached copies of a 2003 Alabama support judgment, enforcing respondent's agreement to pay current support of $204 and an additional $40 on a debt of $1,929, in respect of D. M. A Tuscaloosa County child support clerk informed DCFS there appeared to be no custody order, and that such orders are not usually prepared in child support cases. Appellant had recently married W. B., an individual about whom the report expressed concern, because he had been with appellant after she left the minors at the motel, had numerous arrests and several convictions in Alabama for theft-related offenses, and had been phoning respondent about the case, against respondent's wishes. DCFS recommended termination of jurisdiction over D. M. with his release to respondent, and placement of T. with respondent under an ICPC, noting that respondent considered T. his son and wished to care for him.

On April 26, 2007, the court ordered that both minors be sent to respondent, T. on an "extended visit." Appellant was given monitored contact with the minors in Alabama. At the hearing, appellant's counsel stated that, according to appellant and her husband, respondent had seen the minors at most four times over the past four years, making Christmas appearances but not staying longer than 15 minutes. Appellant desperately wanted the minors placed with her, and was very upset with their being returned to Alabama. The court agreed that that was the appropriate forum for custody litigation.

DCFS next reported that respondent had picked up the minors on May 10, 2007, and returned them to Alabama. DCFS again recommended termination of jurisdiction for D. M., and completion of T.'s ICPC. At the June 13 disposition hearing, the court terminated jurisdiction over D. M., and ordered that respondent have sole legal and physical custody of him, with appellant to have monitored visitation. The court extended T.'s visit with respondent until completion of the ICPC. On July 12, 2007, the court issued a final judgment and family law order as to D. M. (Welf. & Inst. Code, §§ 302, subd. (d), 362.4; undesignated section references are to that code.)

Appellant then appealed, contending that the court had erred in removing the minors from her custody, in terminating jurisdiction over D. M., and in sending T. on an extended visit in Alabama with respondent, a non-relative, without compliance with or completion of ICPC procedures. On May 21, 2008, this court decided the appeal. (*In re Dimitri M.* (May 21, 2008, B201129) [nonpub. opn.].)

We rejected appellant's first two contentions, but held that the court had violated the ICPC by effectively placing T. with respondent without receiving notice from Alabama that the placement would be in T.'s interests. (See Fam. Code, § 7901, art. 3, subds. (a), (d).)[1] Citing *In re Luke* (1996) 44 Cal.App.4th 670, we also noted that the placement seriously interfered with appellant's efforts to reunify with T., making visitation highly difficult. We took judicial notice of juvenile court orders that had been rendered during the appeal, including the one presently under review. We did not comment on them, and we expressly did not require that T. be presently returned to California or removed from respondent's care.

In the trial court, DCFS reported in August 2007 that according to the Alabama social worker who was evaluating respondent's and his mother's home for placement, respondent had previously been incarcerated for nonpayment of child support. Neither

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1 The trial court had previously been advised of Alabama's expressed "concern that the children were placed in the home without prior consent from this agency and any assessment of the appropriateness of the home."

appellant nor respondent had any history of child abuse or neglect in Alabama. The worker also told DCFS that the minors were doing very well with respondent, who had enrolled them in school. DCFS characterized respondent as "provid[ing] a safe, stable home for T."

At a continued progress hearing regarding the ICPC on September 11, 2007, appellant informed the court that she had enrolled in the ordered reunification services, and was seeing an individual counselor. The matter was again continued to October 12, at which time T.'s visit with respondent was again extended. Appellant reported that she had completed a parenting class.

For a six-month review hearing on November 5, 2007, DCFS reported that T. had been enrolled in a pre-kindergarten special education class. He had not had a seizure since arriving in Alabama, and his medication had been reduced; however, he might have autism. Respondent was providing for all of T.'s needs, and expressed willingness to provide a permanent home should reunification efforts not succeed. Appellant was employed in Long Beach; she had not had any visits with T., but spoke to him regularly on the phone. Appellant's present residence, with friends, was not suitable for return of T. to her.

At appellant's objection that she was prepared to resume custody of T., in a suitable home, the court set a contest. At the instance of T.'s and DCFS's attorneys, the court directed that respondent's attorney file a motion to determine respondent's presumed father status.

At the next hearing, appellant agreed that she did not yet have a suitable residence, as the landlord of her apartment would not allow children. She and her husband were saving to get their own place. The court found appellant to be in compliance with the case plan, and directed DCFS to assist her in obtaining a suitable residence. Such assistance was thereafter provided by a family preservation organization.

On January 8, 2008, respondent filed his motion for presumed father status. The motion was based on the case file and respondent's supporting declaration and memorandum.

In his declaration, respondent stated that he considered T. to be his natural child. "Even before T[.] was placed in my care and custody on or about April 26, 2007, I have always received T[.] into my home and have always held T[.] out as my natural child." Respondent explained that he originally believed T. was his biological son, and during appellant's pregnancy he openly held himself as T.'s father, and provided support to appellant for both T. and son D. M. After learning that T. wasn't his son, respondent still treated him as his natural child, "as has my entire family treated T[.] as their natural family member." T. now was bonded with respondent, as his father. Both respondent and his family were willing and able to provide T. care and support, until and after majority.

In her opposing papers, appellant declared that before the detention, "[A]ppellant "has never held himself as the father of T[.], nor had he received T[.] into his home prior to this court's intervention." Appellant added that she had raised T., before detention, without assistance from respondent, who had not provided child support, financial or otherwise, to T. Nor had respondent provided T. with necessities, such as clothing, food, and diapers.

Before the February 7 hearing, DCFS reported that appellant and her husband were presently unemployed, and that appellant had not as yet provided verification of participation in individual counseling. DCFS adverted to "a pattern of instability." T. continued to do well with respondent, and the ICPC was nearing approval.

At the hearing, appellant testified in opposition to respondent's motion.[2] Appellant stated she had never lived with respondent, and he had not assisted her during her pregnancy with T., nor visited the hospital at birth. He provided no support for T., and did so for D. M. only after appellant got an order for support. Both appellant and respondent had originally thought respondent was T.'s father, until the paternity test appellant took in 2006. Under questioning by the court, appellant admitted respondent

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[2] Respondent was not present, but his counsel requested an opportunity for him to respond telephonically, or at a later hearing. The court reserved ruling.

had visited D. M. occasionally, while T. was present. Respondent played with T. on those occasions. Only on one Christmas did he bring each minor a toy. On the other hand, appellant's present husband had lived with her and the minors for several years, and had provided support for both minors; he had acted as a father to them.

On cross-examination, appellant affirmatively answered the question, "[Respondent] has always held himself out as being the father of T[.] before the test; correct?" She also said that on Christmases and perhaps a few other times, respondent had picked up the minors, taken them to his mother's home, and returned them the same day.

During argument, T.'s counsel joined in respondent's claim of presumed fatherhood (as T.'s appellate counsel does here). Appellant urged that her husband's caring for T. showed that T. did not have only appellant as a prospective presumed father. The court, however, ruled for respondent. Citing the Legislative declaration that "[t]here is a compelling state interest in establishing paternity for all children" (Fam. Code, § 7570, subd. (a)), the court noted the unanimous testimony that respondent had always held himself out as T.'s father, until September 2006, and found that respondent had also taken T. into his home since the 2007 disposition.

DISCUSSION

1. Standing.

We first consider respondent's contention that appellant lacks standing to appeal from the grant of presumed father status to respondent, because that ruling does not implicate or affect any cognizable interest of appellant. (See, e.g., *In re Lauren P.* (1996) 44 Cal.App.4th 763, 768.) We do not agree.

Given the legal and practical significance of the mother-child relationship (see, e.g., *In re Kieshia E.* (1993) 6 Cal.4th 68, 76), a natural mother has a significant interest in the determination that another person is the presumed father of her child. Presumed fathers occupy the highest paternal status in dependency proceedings. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) As respondent acknowledges, they are entitled, among other things, to seek custody of the child. (*Ibid.*) Although respondent asserts that the

court has already given him functional custody of T., he ignores that appellant successfully appealed that decision, exercising her unquestioned standing to challenge interference with her maternal rights.

In fact, the Legislature has codified the entitlement of a mother to assert or disclaim that an individual is the presumed father of her child. (Fam. Code, §§ 7630, subds. (a)-(c), 7635, subd. (b); see *Gabriel P. v. Suedi D.* (2006) 141 Cal.App.4th 850, 864.) Moreover, in a case postured very much like the present one, the Supreme Court did not question that the appellant mother had standing to appeal the juvenile court's presumed father ruling. (*In re Nicholas H.* (2002) 28 Cal.4th 56.) The same is true of appellant here, and we conclude appellant has standing.

2. Respondent's Presumed Father Status.

"[I]n considering Mother's challenge to the court's finding that respondent is a presumed father, we apply the substantial evidence test. In doing so, we are required to view the evidence in the light most favorable to th[is] determinatio[n]. We draw all reasonable inferences, and resolve conflicts in the evidence, in favor of the trial court's findings, and we do not reweigh the evidence. [Citation.]" (*In re A. A.* (2003) 114 Cal.App.4th 771, 782.)

As previously stated, the elements of presumed fatherhood under Family Code section 7611, subdivision (d), are that the alleged father "receives the child into his home and openly holds out the child as his natural child." The juvenile court found that the evidence established both factors in relation to respondent and T.

With respect to the factor of "holds out the child," respondent testified in his declaration that he had done so both before and after T. was born, and continued to treat him as his natural child even after learning that biologically that was not so. Appellant's testimony was to the same effect. This element thus was effectively uncontested. Appellant's claim that respondent's testimony lacked sufficient details falls short, both on the merits and because appellant did not object to the admissibility of that testimony.

The element of respondent's receiving T. into his home is a bit less straightforward. In urging that he did so, respondent refers to the short visits to his home

to which appellant testified on cross-examination. It is questionable, however, whether this showing would suffice to establish the element of receipt into the home. (Cf. *In re A. A.*, *supra*, 114 Cal.App.4th at p. 786.)

On the other hand, the evidence did show that when respondent learned that T. and D. M. had been detained in Los Angeles, he came forward and announced that he held out T. as his own child, and that he wished to care for him, and D. M., in his home. Respondent traveled to Los Angeles and appeared in court, and then returned to pick up the minors on May 10, 2007. For the succeeding nine months before the order under review was rendered, respondent fully received T. into his home, and acted as his father. This behavior was sufficient to satisfy the second prong of presumed fatherhood under Family Code section 7611, subdivision (d)

Appellant contends that respondent's receiving of T. after dependency proceedings had commenced should not qualify under the statute. Otherwise, appellant argues, a foster parent could claim presumed parenthood. That is not so. Almost by definition, a foster parent would not and could not hold out the child as his or her natural child, the further necessary qualification for such parenthood.

Precedent confirms that presumed fatherhood may arise through the father's actions after commencement of dependency proceedings. In *In re Phoenix B.* (1990) 218 Cal.App.3d 787, an infant was detained after her mother became hospitalized with a mental breakdown. The unmarried father came forward and the child was released to his care. After they moved to the father's parents' home in Illinois, the juvenile court dismissed the petition, remitting the matter of custody to the family court. On the mother's appeal, the Court of Appeal affirmed. It noted at the outset that the father qualified as the child's presumed father: "The record here supports application of the presumption. It indicates that [father] came forward when the Department instituted dependency proceedings, offered to care for his daughter, took her into his home and, indeed, has held her out as his child." (*In re Phoenix B., supra,* 218 Cal.App.3d at p. 790, fn. 3.)

Another decision, *In re Kiana A.* (2001) 93 Cal.App.4th 1109, not only confirms the relevance of post-dependency conduct but also refutes appellant's implicit claim that respondent's involvement with T. came too late. *Kiana* affirmed the presumed fatherhood of a man who had separated from the mother while she was pregnant, had taken the daughter into his home periodically after she was four years old, but had assumed custody of her at age eight after the mother was arrested, and had proceeded to enroll the daughter in and take her to school every day. The court rejected the claim that this individual could not qualify as presumed father "because [he] failed to make a full and prompt commitment to his parental responsibilities." (*Id.* at p. 1116; see *id.* at p. 1117.)

Appellant also contends that the juvenile court abused its discretion in allowing respondent to raise the issue of his presumed fatherhood several months after the detention hearing, at which inquiry into presumed fathers must be conducted (§ 316.2), and after failing to claim that status at the hearing where he first appeared. We see no abuse of discretion. Respondent could not necessarily have documented presumed fatherhood at the earlier stages of the proceedings. Once he was able to, it was appropriate to hear his claim.

DISPOSITION

The order under review is affirmed.

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O'NEILL, J.*

We concur:

RUBIN, Acting P. J.

FLIER, J.

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* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.